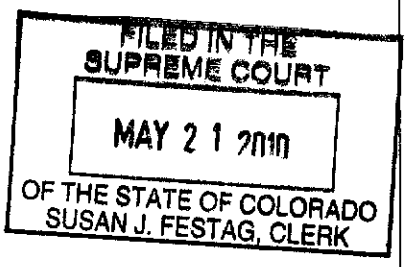
SUPREME COURT, STATE OF COLORADO 101 W. Colfax, # 800 Denver, CO 80202 ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Appeal from the Title Board	
IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2009-2010 #87 **Petitioners:** JOHN GREGORY LEEDE and DOUGLAS KEMPER, registered electors of the State of Colorado v. **Title Board:** WILLIAM A. HOBBS, DANIEL D. DOMENICO and DANIEL CARTIN and **Respondents:** ROBERT HAMEL and JAY P.K. KENNEY, Proponents.	▲ **COURT USE ONLY** ▲
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PETITIONER KEMPER'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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☒ For the party raising the issue:

It contains under a separate heading a concise statement of the applicable standard of appellate review with citation to authority.

Alix L. Joseph

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ISSUES PRESENTED

A. Whether the Ballot Title Setting Board (the "Board") incorrectly determined that Initiative 2009-2010 #87 is limited to a single subject, as required by article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5.

B. Whether the Board incorrectly denied the Petitioners' objection that the title and ballot title and submission clause adopted for Initiative 2009-2010 #87 are misleading and likely to create confusion among the voters, are unfair and do not fairly express the true meaning and intent of the initiative.

STATEMENT OF THE FACTS

Robert Hamel and Jay P.K. Kenney ("Proponents") proposed Initiative 2009-2010 #87 (the "Initiative"), a copy of which is attached hereto as Appendix A ("App. A"), which would add a new section 9 to article XVI of the Colorado Constitution, granting the public the right to float any craft upon any natural stream that is capable of such use, and while doing so, to fish and to make contact with private property underlying a natural stream below the "high water mark." App. A, p. 2 § 9(2). The Initiative declares that these rights "historically" existed. *Id.* Finally, the Initiative asserts "that the public's exercise of such rights does not adversely affect property interests of landowners whose properties are adjacent to

[non-navigable] streams." *Id.* at § 9(1).

The title set by the Board reads as follows:

> An amendment to the Colorado constitution concerning public use of the water of every natural stream within the state, and, in connection therewith, declaring that the public may float any craft upon any natural stream that is capable of such use, make contact with the bed or banks of the natural stream below the high water mark, and fish while floating, and stating that the measure shall not be construed to allow access to a natural stream by crossing private land without permission, allow the dropping or dragging of an anchor or the intentional broaching of a craft, create a water right, affect any existing water right, or impair the right to appropriate water, or affect title to the bed or banks of any natural stream.

Id. at 15. The ballot title and submission clause as designated and fixed by the Board is substantially the same as the title, except that it begins with the phrase "[s]hall there be," and ends with a question mark. The Titles set at the same time for Initiative 2009-2010 #88 ("Initiative #88"), a copy of which is attached hereto as Appendix B, are identical in all respects to the Titles set for Initiative #87, even though the text of Initiative #88 omits the assertion in Initiative #87 that the rights granted therein historically existed.

STATEMENT OF THE CASE

The Board conducted a public meeting pursuant to C.R.S. § 1-40-106(1) on April 21, 2010, at which time it designated and fixed a title, ballot title and submission clause (collectively referred to herein as the "Titles") for Initiative #87. Petitioner Douglas Kemper, a registered elector of the State of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on April 28, 2010. The Motion for Rehearing was heard, together with a Motion for Rehearing filed by Petitioner John Gregory Leede, on April 30, 2010. At the rehearing, the Board, by majority vote, adopted a few amendments to the Titles, but otherwise denied Mr. Kemper's objections. Mr. Kemper seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2) with regard to the issues set forth below.

SUMMARY OF ARGUMENT

Initiative #87 has multiple subjects because, in addition to establishing a public right to float on natural streams crossing private property, it also states that the Colorado Constitution "historically included" such a right. That assertion not only goes beyond any right previously established in the Constitution, but flatly contradicts this Court's decisions applying the Constitution to private property rights. By reaching back historically to alter property rights, this Court has

previously confirmed the Initiative has a second purpose with no necessary or proper connection to the establishment of new public easement rights.

Even if the Court determines the Initiative contains a single subject, the Titles set by the Board do not fairly express the true intent and meaning of the Initiative. The Titles only describe the public use right the Initiative would enact, and the express limitations on that right; they do not disclose the provision stating that the Constitution "historically included" such a right. The Titles are identical to those the Board set simultaneously for Initiative #88, causing confusion by ignoring the material difference between the two measures.

LEGAL ARGUMENT

I. The Initiative contains at least two distinct subjects.

The Initiative violates the single subject rule, as it contains at least the following distinct subjects and purposes:

1. To grant the public the right to float any craft upon any natural stream that is capable of such use, and while doing so, to fish and to make contact with private property underlying a natural stream below the "high water mark"; and

2. To declare, thereby expunging Colorado law and existing property rights established and confirmed in *People v. Emmert*, 597 P.2d 1025 (Colo. 1979), and *Hartman v. Tresise*, 84 P. 685 (Colo. 1905), that the right to use waters of natural streams "historically included" the right to float any craft upon any natural stream overlying private property that is capable of such use, including the specified right to fish and to make contact with the stream bed and banks on private property.

A. Standard of Review.

A proposed initiative violates the single subject requirements of article V, section 1(5.5) of the Constitution and C.R.S. § 1-40-106.5 when it "relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #256,* 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1078-79 (Colo. 1995)) (brackets in original).

Generally, the Board's actions are treated as presumptively valid. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1222 (Colo. 2000). However, the "court must sufficiently examine an

initiative to determine whether a measure violates the single subject rule." *In re Title Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). When necessary, the court may characterize a proposal sufficiently to enable review of the Board's actions. *Id.* The court must "examine sufficiently an initiative's central theme, as expressed, to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Id.* at 279.

B. An Initiative must be limited to only one subject.

The danger associated with a broad general theme containing multiple subjects is the "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex [initiative]." *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009) (quoting *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007)). The assertion of historical rights in the Initiative is just such a "surreptitious provision."

To evaluate whether or not an initiative encompasses a single subject, the Court should first look to the text of the proposed initiative. *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). The

Court should employ the usual rules of statutory construction, including reading all words and phrases in context and construing them according to the rules of grammar and common usage. *In re Title, Ballot Title, and Submission Clause and Summary for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). In construing an initiative's language, each clause is presumed to have a specific purpose. *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 542 (Colo. 1996). The Court should favor a construction that will give effect to each word, rather than one that will render some words useless. *City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo. 1995).

C. Establishing a constitutional public easement right and retrospectively deeming the Constitution to have included the new easement right are two separate purposes.

The primary objective of the Initiative is to establish a constitutional public easement right on streams across private property. The Initiative would amend article XVI of the Colorado Constitution by adding a new section, declaring "[t]he right to use the water of every natural stream . . . historically included and shall continue to include . . . the right to float upon any natural stream capable of such use," and the right "to make such contact with the bed or banks of the natural stream below the high water mark that is the minimum possible for the full and

safe enjoyment of the public's easement to float." App. A, p. 2, § 9(2)(a)-(c).

The second purpose of the Initiative is to declare that the easement rights described in the Initiative historically existed in Colorado's Constitution. The Initiative declares that riparian landowners adjacent to every Colorado stream do not own, and have never owned, clear title to the bed and banks of the stream below the high water mark. *See id.* The Initiative gives the floating public the right to make contact with the bed and banks below the high water mark, regardless of whether the stream is navigable or non-navigable. *Id.* The text of the Initiative further declares that such a grant "does not adversely affect [the] property interests of landowners whose properties are adjacent to natural streams." *Id.* at § 9(1). The statements regarding the historical existence of the right to float reject a property interest previously recognized by this Court and improperly create a separate subject. *See Emmert*, 597 P.2d at 1030 (holding that the beds of non-navigable streams in Colorado are not, and have never been, held by the State); *see also Bd. of County Com'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 709 n. 29 (Colo. 2002) (acknowledging that, consistent with the holding in *Emmert*, the beds of non-navigable streams in Colorado are not held by the State under a public trust theory).

1. By giving the phrase "historically included" its plain meaning, two separate subjects are created.

In evaluating whether an initiative contains multiple subjects, the Court employs usual rules of statutory construction, including reading all words and phrases in context and construing them according to the rules of grammar and common usage. *In re 2005-2006 #75*, 138 P.3d at 271. Thus, the term "historically included" must be given meaning. *See Acosta*, 892 P.2d at 267 (holding that court should favor a construction that will give effect to each word). The Proponents intended this phrase to have meaning, as the only difference between section (2) of their simultaneous Initiative #88 and this Initiative is the omission of the "historically included" language from section (2) of Initiative #88.

The plain language of the term "historically included" implies an intent not only to retroactively apply this language to previous actions, but also to retrospectively treat the Constitution as having included this right. Only where a constitutional amendment clearly shows an intent for retrospective operation, will the amendment apply retrospectively, as opposed to solely prospectively. *In re Great Outdoors*, 913 P.2d at 539. The additional language, however, is inconsistent with the long-established provisions in the Colorado Constitution and this Court's interpretation thereof.

a. Current Colorado law does not allow individuals to float across private property or to fish in waters bounded by private property.

In *Emmert*, the Court determined that section 5 of article XVI of the Colorado Constitution did not give the public the right to float and fish on the non-navigable Colorado River across the boundaries of privately-owned property without first obtaining the consent of the property owner. In that case, the defendants sought to float rafts down the river, which varied in depth from twelve inches to several feet, as the river bed crossed the Ritschard ranch. *Emmert* 597 P.2d at 1026. The defendants did not leave their rafts or encroach upon the shoreline or the banks of the river, yet were accused of trespassing. *Id.* The Court stated that the river was not navigable because it had not historically been used for commercial or trade purposes of any kind. *Id.* However, the river had been used by recreational floaters using rafts, tubes, kayaks, and flat-bottom boats. *Id.* The Court upheld the trespassing conviction because "the public has no right to the use of waters overlying private lands for recreational purposes without the consent of the owner." *Id.* at 1030.

Similarly, *Hartman* determined that section 5 of article XVI of the Colorado Constitution did not create a public fishery right. *Hartman*, 84 P. at 687. There,

the Court determined that because the plaintiff owned lands bordering on both banks of the natural streams, he owned the right of fishery in their waters within his outer boundaries. *Id.* Moreover, legislation purporting to establish public fishery rights on such streams was held to violate the takings prohibition of the Colorado Constitution, article II, section 15. *Id.* at 152.

b. By giving the phrase "historically included" its plain meaning, the initiative requires a reinterpretation of Constitutional rights.

When the phrase "historically included" is given any meaning, it results in the easement rights granted by the initiative being applied retroactively, overruling precedent, bringing into question the status of previously determined rights and possibly violating the takings clause of both the Colorado and United States Constitutions.

When members of the Board, seeking to better understand the Initiative, specifically asked whether the Proponents intended a legal change with the addition of the phrase "historically included," the Proponents' counsel sidestepped the question. Mr. Grueskin responded that this portion of the Initiative is intended "to just say what the people recognize." Rehearing Transcript dated April 30, 2010 ("Rehearing Transcript"), p. 21, ll. 3-13. A copy of the Rehearing Transcript is attached hereto as Appendix C. Despite their vague answer, the Proponents

presumably intend "historically included" to have some effect or they would not have added it to the Initiative while specifically leaving it out of Initiative #88, in which section (2) is otherwise identical to section (2) of Initiative #87. While the Board decided to narrowly interpret the phrase "historically included" to avoid a single subject problem, such an interpretation does not distinguish between Initiative #87 and Initiative #88. *See* App. C, p. 39, ll. 9-25 ("My view is that we would have a single-subject problem on our hands, if not necessarily a violation, if this really did purport to change historic law."); *compare* App. A to App. B.

This Court recognized in *Hartman*, and expressly reaffirmed in *Emmert*, that article XVI, section 5 of the Colorado Constitution (part of the Constitution since statehood) "was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation." *Emmert*, 597 P.2d at 1028. At the same time, the Court in *Emmert* rejected the defendant's proffered rationale of "the creation of a public trust based on usability, thereby establishing only a limited private usufructary right." *Id.* at 1027. By declaring that Colorado constitutional rights "historically included" interpretations that this Court rejected in *Emmert* and *Hartman*, the Initiative would reopen the

rationales rejected by the Court in those decisions, demanding reinterpretation of section 5 to have included the rights that the Initiative would add as section 9 of article XVI. The reinjection of such "public trust" theories into the historical interpretation of section 5 is a separate purpose and subject, just as this Court held the creation of a "public trust" standard for agency decisions to be a separate subject in *In re 2007-2008 #17*, 172 P.3d 871.

By giving the phrase "historically included" its plain meaning, the Initiative would create a new public right to traverse waters overlying private property, eliminating the private property rights affirmed in *Emmert* and *Hartman*. As a result, takings claims may arise. *See Hartman*, 84 P. at 687. By including the phrase "historically included", the Initiative attempts to establish a constitutional basis to deny takings claims. App. C, p. 9, ll. 7-15, p. 24, l.23 – p. 25, l. 12. This addition, however, gives the Initiative a separate subject and purpose, designed to undermine historically established legal precedent and property rights.

2. Historically applying the easement rights is not necessary and proper to implement the constitutional change contained in the Initiative.

Initiatives spelling out implementation details do not violate the single-subject requirement if the procedures specified in detail have a "necessary and proper relationship to the substance of the initiative." *In re Title, Ballot Title and*

Submission Clause and Summary for 1999-2000 #255, 4 P.3d 485, 495 (Colo. 2000). "Necessary" describes an object that is "logically unavoidable . . . absolutely needed: required." MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 790 (1984). Similarly, to be "proper", such language must be "strictly limited to a specified thing, place or idea [or] marked by suitability, rightness, or appropriateness." *Id.* at 943. As such, details in an initiative must not only be logically connected to the central theme of the initiative, but must be logically unavoidable in completing the specified objective. Requiring each initiative to contain only necessary and proper subparts ensures that each objective depends upon its own merits for passage. *In re Title, Title Ballot and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 440 (Colo. 2002).

The plain language of the Initiative makes clear that it is intended to apply retrospectively and retroactively. Declaring historical constitutional rights and thereby eliminating existing legal precedent is unrelated and unnecessary to grant the public rights to use natural streams. A voter might favor increasing the public's right to use natural streams but might strongly oppose taking away current property rights without just compensation. *In re Title, Ballot Title, Submission Clause and Summary for 1999-2000 #29*, 972 P.2d 257, 265 (Colo. 1999)

Similarly, while the two subjects both involve the right to use water in streams, this subject is too general and too broad to constitute a single subject, just as "water" was found not to be a single subject in *In re "Public Rights in Waters II,"* 898 P.2d at 1080.

While this Court has determined that an initiative can create a public trust in waters of the State, *In re Title, Ballot Title, Submission Clause and Summary 1996 #6*, 917 P.2d 1277 (Colo. 1996), it has repeatedly stated that pairing the creation of such a public right with another subject is inappropriate. *See e.g., In re 2007-2008 #17*, 172 P.3d at 876 (reversing the Title Board's decision to set a title for an initiative that created a public trust standard while consolidating environmental protection and natural resource conservation agencies); *In re "Public Rights in Waters II,"* 898 P.2d at 1080 (reversing the Title Board's decision to set a title for an initiative that created a public trust while establishing election and boundary rules for water conservancy and conservation districts). The stated retroactive effect of the Initiative and its effect on existing Colorado law and rights likely will surprise voters. Therefore, Initiative #87 violates the single subject requirements of article V, section 1(5.5) of the Colorado Constitution.

II. The Titles do not fully express the Initiative's true intent and meaning.

The title should be "a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). In setting Titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." C.R.S. § 1-40-106(3)(b). The Titles for the Initiative fail to meet these standards, in that they: (1) do not disclose the fact that in creating public easement rights across streams on private property, the Initiative claims to establish such rights retroactively; and (2) are identical to the Titles for Initiative #88, which does not include a provision for retroactive application of the easement rights. Furthermore, as addressed in Petitioner Leede's Opening Brief, the Titles do not adequately express the impact on private property rights.

A. Standard of Review.

In reviewing Titles, the court must "engage all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). While the court may not rewrite the titles or submission clause for the Board, it must

determine whether the prohibition against unclear titles has been violated. *Id.* The court must "reverse the Board's action in preparing [the Titles] if they contain a material and significant omission, misstatement, or misrepresentation." *Id.*

B. The Titles do not disclose the fact that the Initiative seeks to declare that Colorado's Constitution historically included a public easement across streams on public property.

Retroactively applying constitutional amendments is highly disfavored, and in the statutory context, amendments that take away or impair vested rights are unconstitutional. *In re Great Outdoors*, 913 P.2d at 539; *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 444 (Colo. 2000). As shown above, the phrase "historically included" in the Initiative would retroactively apply the constitutional changes, if it is given any meaning whatsoever. Accordingly, for voters to understand the effect of a "yes" or "no" vote, it is critical for the Titles to inform them of this provision. Without disclosure of this Initiative's provision that creates a retroactive effect, voters may not realize that those who have enjoyed a private property right to the surface waters flowing over their property may be precluded from pursuing compensation for takings because the Initiative declares that they never had such a private property right.

C. The Titles are confusing in that the Board adopted the same Titles as for Initiative #88, which does not include the phrase "historically included."

The Board is prohibited from setting Titles that "conflict with those selected for any petition previously filed for the same election . . . ." C.R.S. § 1-40-106(3)(b). This Court has held that Titles conflict when the language is identical and fails "to distinguish between overlapping and conflicting proposals." *In re Proposed Initiated Constitutional Amendment Concerning "Fair Treatment II,"* 877 P.2d 329, 332 (Colo. 1994) (quoting *In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 722 (Colo. 1994)). Unlike the set of petitions considered in "*Fair Treatment II,*" where the Titles expressly distinguished two conflicting proposals that could be on the ballot at the same time, here, the Board simultaneously set identical Titles for Initiative #88 and Initiative #87.

Initiative #87 declares that the right to use the water of Colorado streams "historically included and shall continue to include" certain easement rights. App. A, p. 2, § 9(2). Initiative #88 merely declares that the right to use the water of Colorado streams "includes" those same easement rights. App. B, § 9(2). As explained above, Initiative #87 would establish the specified rights to use the water

of every natural stream not only prospectively, but also retrospectively. In comparison, Initiative #88 only defines such rights prospectively. Despite this material difference in the two measures, the Board set identical Titles for Initiatives #87 and #88, relying on a verbal assurance from the proponent's attorney that the proponents would not circulate both Initiatives #87 and #88. Transcript of Rehearing on Initiative #88, April 30, 2010, p. 5, ll. 4-9, a copy of which is attached as App. D; Hearing Transcript, April 21, 2010, p. 23, ll. 3-10, a copy of which is attached as App. E.

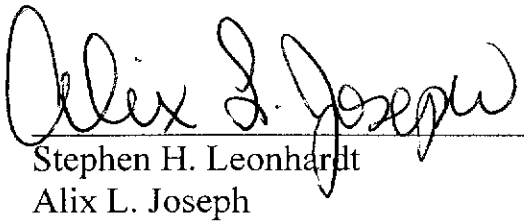
The Titles set for Initiative #87 fail to distinguish it from the Titles set by the Board for Initiative #88. Voters or petition signers comparing the Titles set for Initiatives #87 and #88 might not be able to distinguish between the two proposed measures and thus could be misled into voting for or against a measure by reason of the words chosen by the Board. Accordingly, even if this Court finds that Initiative #87 encompasses a single subject, it should remand this matter to the Board to set Titles that accurately reflect the true intent and meaning of Initiative #87 by disclosing its impacts and distinguishing it from Initiative #88.

CONCLUSION

The Initiative violates the single subject requirement in that it contains two separate subjects. Accordingly, the Board erred by setting a title and its action should be reversed. In the alternative, the Titles should be remanded to the Board for modification so that they express the true intent and meaning of the Initiative and distinguish the Initiative from Initiative #88.

Respectfully submitted this 21st day of May, 2010.

BURNS, FIGA & WILL, P.C.

By: 

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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was served on this 21st day of May, 2010, as follows:

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